



ZUCKERMAN SPAEDER LLP

MICHAEL S. PASANO
MPASANO@ZUCKERMAN.COM

201 SOUTH BISCAYNE BOULEVARD SUITE 600
MIAMI, FL 33131-4326
305 358.5000 305 579.9749 fax www.zuckerman.com

October 22, 2003

April J. Sands, Esquire
Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, DC 20463

**VIA FEDERAL EXPRESS
& FACSIMILE**

Re: MUR 5357 – Ken Bailey

Dear Ms. Sands:

This submission is in response to correspondence from the Federal Election Commission ("FEC") dated September 24, 2003, advising that the FEC has found reason to believe violations of 2 U.S.C. § 441(f) have occurred and follows the complaint filed by Centex Corporation regarding possible elections law violations at a Centex subsidiary called Centex-Rooney Construction Company Inc. ("Rooney"). Attached is a statement of designation of counsel indicating that Mr. Bailey has asked my law firm to represent him in lieu of the law firm of Arnold & Porter. However in connection with this response undersigned has authorized Arnold & Porter and attorney Robert Litt to include representations as to Mr. Bailey in its responses to the FEC on behalf of Centex. Also attached hereto is a sworn affidavit from Mr. Bailey in support of the instant response. This response is Mr. Bailey's first opportunity to be heard. The September 24, 2003 letter was the first notice he had that he was implicated by Centex' complaint and subject to legal findings. For the reasons set forth below, we respectfully disagree with the finding of "reason to believe" and urge that the FEC conclude that no action should be taken against Mr. Bailey.

Kenneth Bailey is currently the Senior Vice President of Centex Construction Group ("CCG"), and Chairman of Centex Engineering and Construction. Collectively, these are part-time employment positions to which he was appointed after retiring as Executive Vice President and Chief Operating Officer ("COO") of CCG on March 31, 2001. From March 9, 1998 through March 31, 2001, Mr. Bailey was Executive Vice President and COO of CCG. During that period, he was based in Dyersberg, Tennessee. His jobs at CCG are operational in nature. He is not involved in policy making. In particular, he was not and is not involved in the setting of discretionary management bonuses and had no role in bonus decisions.

The Complaint/Background

In January 2003, the CEO of Centex directed its General Counsel to undertake an investigation into whether or not employees of Rooney may have been reimbursed with

0862 904 40 32

RECEIVED
OCT 23 11 03 AM '03
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
999 E STREET, N.W.
WASHINGTON, DC 20463



October 22, 2003

Page 2

corporate funds for individual political contributions. Thereafter Centex retained the law firm of Arnold & Porter to assist in this investigation. The instant complaint contains the results of the Arnold & Porter investigation.

Rooney is a long-standing construction company with an excellent reputation which operates in and outside of the State of Florida. Bob Moss joined Rooney in 1986 as Chairman, President and CEO. In 2000, Mr. Moss was promoted to the position of Chairman and CEO of Centex Construction Group. Mr. Moss remained as Chairman at Rooney.

Gary Esporin joined Rooney around the same time as Mr. Moss and served as CFO of Rooney. Mr. Esporin was promoted in 2000 to co-CFO of Centex Construction Group but retained his position at Rooney. Mr. Esporin reported directly to Mr. Moss.

Rooney employees participated in several incentive compensation plans that paid bonuses to employees. A percentage of the bonus pool was reserved for discretionary bonuses. Mr. Moss and Mr. Esporin handled the bonus process. Mr. Moss reviewed and set the discretionary bonuses for the Rooney employees.

Rooney employees were encouraged to be active in their community affairs, including attending and participating in political fund-raisers, and making political and charitable contributions as part of Rooney's emphasis on relation-building and marketing. Mr. Moss and Mr. Esporin asked employees to keep them informed about these kinds of activities, including reporting the amounts of political contributions and to whom they were made.

It turns out that Mr. Esporin kept track of contributions and calculated amounts that would reimburse employees for contributions, "grossing up" the amounts to offset tax liability. These calculations were set out on spread sheets Mr. Esporin maintained and apparently used when employee annual bonuses were determined. Centex and Arnold & Porter have concluded that contained within the large discretionary incentive compensation bonuses which some Rooney employees received were amounts that reimbursed for contributions made. The bonus checks did not show that this had occurred. Moreover, the Esporin spreadsheets were not shared with Rooney employees.

The complaint does not implicate Mr. Bailey. In particular, the complaint does not say that Mr. Bailey made any contributions or requested reimbursement for the making of these contributions. He did not. The complaint does not say that Mr. Bailey was aware of reimbursements. He was not. The complaint does not say that Mr. Bailey was involved in any way with the bonus process or consulted at any time about the propriety of making reimbursements. He was not. Mr. Bailey is not involved in policy making. His involvement in this matter, in total, appears to be his participation in a meeting in 1998 with Mr. Moss

23-04-406-2983



and with Brice Hill, then Chairman and CEO of Centex Construction Group, where Mr. Hill agreed that Mr. Moss could take into account political activity along with other community involvement in determining executive bonuses.

Centex/Rooney

Centex and Rooney are highly regarded companies with no history of improper behavior. The companies maintain high ethical standards and have clear policies that business is conducted in accordance with both the letter and the spirit of all applicable laws. Rooney employees tend to stay at the company. Its executive officers have all been with Rooney for many years. Bob Moss and Gary Esporin had excellent reputations. Kenneth Bailey and other Rooney employees are dedicated to the company, proud of its accomplishments, and committed to doing their jobs in an appropriate and professional manner.

Relevant Law

Pursuant to Section 441f of Title 2 of the Act, "no person shall make a contribution in the name of another or knowingly permit his name to be used to effect such a contribution..." Commission regulations made explicit that the prohibitions of Section 441f apply to individuals who help or assist in the making of contributions in the name of another. 11 C.F.R. § 110.4(b).

Pursuant to 2 U.S.C. § 441b, a corporation may not make a contribution in connection with the election of a candidate for federal office.

In determining if and how to proceed with possible violations of the Act, the Commission looks at whether any violations in fact occurred and whether the violations of law are knowing and willful. When Congress amended the Act in 1976 to centralize the criminal penalties for violations of the Act, it was concerned about the complexity and technical nature of the statute and the potential that non-culpable people could be caught up in apparent violations of law. See 122 Cong. Rec 8577 (March 30, 1976 statement of Representative Rostenkowski). During the House debates on the Conference Report for the 1976 Amendments, Congressman Hays stated that the phrase "knowing and willful" referred to "actions taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec H 3778 (May 3, 1976 remarks of Congress Hays).

This strict and liability-limiting notion of what constitutes knowing and willful acts has been adopted by the Courts. See e.g., Federal Election Commission v. Friends of Jane

23.04.406.2982



Harman, 59 F. Supp 2d 1046 (C.D. Calif. 1999); Federal Election Commission v. John A. Dramesi for Congress Committee, 640 F. Supp 985 (D.N.J. 1986).

Pertinent Facts

Ken Bailey attended a meeting with Brice Hill and Bob Moss in 1998. During the meeting, Mr. Moss brought up the issue of how Rooney could make contributions to local candidates for office in counties in Florida where Rooney operated. Mr. Moss did not think the Centex PAC would be effective for contributions of this nature. Mr. Hill and Mr. Moss discussed the subject and Mr. Bailey mostly listened. Mr. Moss ultimately said he would take a Rooney employee's political activity into account at bonus time, to the extent it benefited Rooney. Mr. Hill agreed this would be appropriate. The subject of federal campaign contributions was not discussed during this meeting. Nor was there any discussion of Rooney reimbursing political contributions dollar-for-dollar.

At no time did Mr. Bailey either approve or acquiesce in any scheme to reimburse political contributions. He did not consent to corporate contributions and he did not assist in making contributions in the name of another. Mr. Bailey is not involved in approving bonuses for Rooney employees and was unaware of how Moss and Esporin handled bonuses. Mr. Bailey never saw any bonus spreadsheets. He had no contact whatsoever with this process.

Mr. Bailey was not reimbursed for any political contributions he made. He was not involved in any other discussions regarding Rooney bonuses with Mr. Moss. He did not speak about these things with Mr. Esporin. His next contact with this issue came at the time of the company's internal investigation in 2003.

In sum, Mr. Bailey did nothing improper or remotely culpable in this matter.

Analysis

The Commission is well familiar with cases involving allegations of companies reimbursing employees and third parties for political contributions. In determining what action to take, the Commission typically looks at evidence whether the "conduit employees" knew they were being reimbursed; knew their actions were illegal; and/or participated in acts of additional complicity. Cases where the Commission has taken action against the "conduit employees" have typically involved matters where there was clear evidence of knowledge and complicity. See e.g. MUR 2893 (Westwood One); and MUR 3508 (New Enterprise Stone and Lime Co.). Many such cases include evidence of falsification of company records in which employees played a part. In other cases, where there was no

23 04 40 22



October 22, 2003

Page 5

evidence of additional complicity by the "conduit employees", the Commission has elected to take no action, albeit sometimes issuing letters of admonishment. See e.g. MUR 4286 (General Cigar Co.); MUR 4884 (Future Tech Int'l); and MUR 5187 (Mattel Inc.).

Here, there is no evidence Ken Bailey ever knew about the reimbursements. There is certainly no evidence Ken Bailey did anything to further the "reimbursement scheme". Ken Bailey never thought he was doing anything even remotely inappropriate in participating in a discussion in 1998 with Mr. Hill and Mr. Moss. He did nothing inappropriate. He certainly never acted knowingly or willfully.

Conclusion

Ken Bailey's conduct in no way amounts to a violation of the Act. We respectfully disagree with the FEC's finding of "reason to believe". We urge the FEC to reconsider this finding and/or to decide to take no further action as to Mr. Bailey. We urge the FEC to close this matter by reaching settlement and entering into pre-probable cause conciliation agreements with Centex-Rooney Construction Co. Inc. and Centex Construction Group Inc.

Undersigned is still investigating the facts and allegations as to Mr. Bailey. We believe the statement in the FEC's correspondence dated September 24, 2003 that he "consented to corporate contributions and assisted in making contributions in the name of another" is inaccurate. Nevertheless, Mr. Bailey accepts the FEC's offer to participate in negotiations and authorizes you both to discuss his situation in meetings with company counsel and to send to us a proposed pre-probable cause conciliation agreement. By agreeing to this process, Mr. Bailey reserves all rights to submit additional factual and legal materials in the future and does not mean to suggest he will consent to conciliation. He simply wants to move this process along.

If you have any questions, or require further information, please contact us at 305-579-0110.

Sincerely,

Michael S. Pasano
Counsel to Kenneth Bailey

MSP:emt
Enclosures

cc: Kenneth Bailey
Robert Litt, Esq.

4867-904-40-32